91-145

(1)

Supreme Court, U.S.
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No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

RICHARD JOHN CHARD III

Petitioner,

v.

PEOPLE OF THE STATE OF COLORADO

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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QUESTIONS PRESENTED

I. Did the Colorado court deny fundamental fairness and due process to Richard Chard, by establishing a new rule of law in his case and then refusing to remand the case to the trial court for application of the new rule of law to his case?

II. Did the Colorado court deny Richard Chard fundamental fairness, due process, and the right to be informed of the nature and cause of the allegations, by its refusal to permit (a) an independent physical examination of his minor daughter, and (b) an independent mental examination of his daughter, when his ex-wife's actions and interests prompted the filing of sexual abuse charges against him?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Richard John Chard III, the Petitioner herein prays that a writ of certiorari issue to review the judgment of the Supreme Court of Colorado in the case, *People of the State of Colorado v. Richard John Chard III*, dated March 11, 1991, with rehearing denied on April 22, 1991, and Writ of Mandate entered on April 30, 1991.[1]

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[1] As noted in the decision of the Colorado Court of Appeals, there was an appellate issue which the court did not address.

"In view of our disposition of this case, we do not address defendant's contention regarding the ruling on the violation of the witness sequestration order." Slip op., p. 3.

On May 23,1991, counsel forRichard Chard filed a Motion for Stay or Recall of Mandate with the Colorado Court of Appeals. Counsel has requested that the Mandate be stayed until the Court of Appeals addressees the second appellate issue in this case. No action has yet been taken an this motion.

I.

OPINIONS BELOW

The opinion of the Supreme Court of Colorado is reported as follows, *People of the State of Colorado v. Richard John Chard III*, 808 P.2d 351 (Colo. 1991). The opinion of the Colorado Court of Appeals, August 31, 1989, was not selected for publication (Case No. 87CA1965).

II.

JURISDICTION

The decision of the Supreme Court of Colorado was rendered on March 11, 1991. A petition for rehearing was filed in the Supreme Court of Colorado on April 10, 1991, and was denied by the Court on April 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (2) and (3).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

The following Amendments to the Constitution of the United States are involved in this Petition: the

Fourth Amendment; the Fifth Amendment; the Sixth Amendment; the Fourteenth Amendment.The specific provisions of each which pertain to this case are,

Amendment IV. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.

Amendment V. ...nor [shall any person] be deprived of life, liberty or property, without due process of law...

Amendment VI. In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor...

Amendment XIV. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...

IV.

STATEMENT OF THE CASE

Richard John Chard III was charged with aggravated incest after the Routt County Colorado District Attorney was provided with information from Mr. Chard's ex-wife, his minor daughter who was living with the ex-wife and stepfather, and the counsellor/advocate for the daughter — all of whom were living in California at the time. Mr. Chard was tried and convicted, and appealed the decision to the Colorado Court of Appeals. The Court of Appeals reversed the conviction, finding that Mr. Chard was entitled to independent physical and mental examinations of his daughter, for purposes of his defense.

The Colorado Supreme Court accepted the case upon petition for certiorari, and in its Opinion, established for the first time the Colorado rule for the rights of defendants in this type of criminal action. This new Colorado rule had not been applied by the trial court in this action. One justice of the Colorado

Supreme Court dissented in the Court's ruling, stating that the matter should be remanded to the trial court in order to allow that findings be made and to allow the application of the new rule to the proceedings in this case. The decision of the majority of the Colorado Supreme Court, reversing the Colorado Court of Appeals, is the subject matter of this Petition.

V.

STATEMENT OF FACTS

The Petitioner in this action, Richard Chard, was divorced from his ex-wife (Mrs. Sansivieri) in August, 1982. Sansivieri remarried and moved to California, taking their young daughter, Risa, with her.

Richard Chard had visitation rights with his daughter, and Risa visited him in Steamboat Springs, Colorado, during the summer of 1986. Richard returned Risa to Sansivieri and her stepfather on the first of September, 1986.

In spite of the fact that Richard had been divorced from Sansivieri for over four years, there was still bitter disagreement over issues of child support and visitation. Sansivieri was seeking a decrease in Richard's visitation rights with his daughter (Tr. 487, 488).

In February, 1987, Sansivieri took Risa to pediatrician Valerie Young, M.D., of Newport Beach, California for a medical examination. Mr. Chard had not seen Risa during the period of time that had elapsed since September 1, 1986 when Risa was returned from her visitation. On February 27, 1987, Dr. Young referred Risa as a potential sexual abuse victim for further examination to Suzanne Long of Irvine, California. Ms. Long is a child-advocate assisting children she believes to be sexually abused. Ms. Long met with Risa on March 5, 1987 and again on March 12, 1987. She thought that Risa had been sexually abused. Relying upon this information, the Office of the District Attorney for the 14th Judicial District of Colorado charged Mr. Chard on April 10, 1987 with aggravated incest.

Ms. Long characterized herself as a child protection advocate (Tr. 353, 354). No additional examinations were performed. On June 8, 1987, Mr. Chard filed his Motion for Physical and Mental Examination of the alleged victim. This motion was heard on June 21, 1987.

Physical Examination Request. At the hearing June 21, 1987, Mr. Chard elicited the testimony of David Wilkinson, M.D. No testimony was presented by the People. Dr. Wilkinson testified that a second examination "would be beneficial in determining ongoing sexual abuse versus cessation of sexual abuse", (Tr. 14). He further testified that "one potential benefit" of such an examination would be that such further examination would assist the trial court in making informed determinations pertaining to temporal aspects of sexual abuse (Tr. 15). Dr. Wilkinson specifically recommended medical procedures including one referred to as a colposcopy (Tr. 18) to scientifically determine the condition of the child's vaginal and rectal areas, because of the subjective criteria involved in measurement (Tr. 31, 32).

Dr. Wilkinson related that although such examinations have the potential to be traumatic (Tr. 20) there was no evidence that Risa would be traumatized. Dr. Young never indicated that a physical examination would traumatize Risa (Tr. 15). There was no report of crying or protestation on the part of Risa during previous medical examinations (Tr. 31). The trial court was specifically advised that Dr. Young did not believe another evaluation of Risa would traumatize her (Tr. 44).

A physical examination of Risa in June of 1987 would have indicated whether there had been any sexual activity since her examination by Dr. Young in February, a period in which she had not seen her father, Richard. A physical examination would have allowed for both factual and opinion testimony from the defendant's doctor. It would have provided a basis for examination or cross-examination of Dr. Young, and possibly of Risa.

A mental examination likewise would have allowed for another expert view of Risa's knowledge, understanding and mental condition. This information might have allowed an expert to testify on Mr. Chard's

behalf. It would have assisted in the examination or cross-examination of Ms. Long. And, it might have assisted Richard Chard in proving not only his innocence of these charges, but the true motivation of his ex-wife.

Trial Court's Ruling. The trial court denied Mr. Chard's Motion. The trial court held that:

> "...the benefits that could possibly be derived from another physical examination are 1) speculative, and 2) simply this Court does not believe that they would in fact show anything beneficial that could conceivably be presented at the time of the trial in this case.
> ...this Court cannot believe that the child would be so petrified as to be unable to report ongoing assaults at this point in her life, and in light of the fact that she apparently is now in some kind of therapy." (Tr. 83)

Colorado Court of Appeals. In reversing the District Court's aforementioned decision, the Colorado Court of Appeals drew a legal analogy between psychological examinations and physical examinations.

> "...a court should order a psychological examination of an alleged child molestation victim only if there is a compelling reason for it, and, in assessing whether such an examination is needed, a court should balance the possible

> emotional trauma, embarrassment, or intimidation of the child against the likelihood of the examination producing material, as distinguished from speculative evidence. The same test is applicable for physical examinations." *People v. Chard*, (Colorado Court of Appeals, August 31, 1989) slip op. at 2.

Colorado Supreme Court. In reversing the decision of the Colorado Court of Appeals, the Colorado Supreme Court established a new standard for determining whether a trial court should order an involuntary physical examination of a minor victim of sexual assault upon request of the accused.

The court stated:

> "We therefore adopt the majority view and hold that a trial court may exercise its discretion to order an involuntary physical examination when a defendant demonstrates a 'compelling need or reason' for the examination." *People vs. Chard*, 808 P.2d 351 at p. 356.

In describing the appropriation application of the new standard, the court went on to expressly instruct trial courts to:

> "Balance the possible emotional trauma, embarrassment or intimidation to the complainant against the likelihood of the examination producing material, as

distinguished from speculative evidence." *Chard Supra* 356.

However, rather than remand the case to the trial court for further findings and for application of the new rule, the Court simply affirmed the trial court's decision.

VI.

REASONS FOR ALLOWANCE OF WRIT

Introduction

There are serious issues here which require this Court's attention. Richard Chard was denied the opportunity to present his argument and evidence under the rule which was *subsequently* adopted by the Colorado Supreme Court. Mr. Chard was not afforded a presumption of innocence or a reasonable opportunity to prove his innocence. In spite of uncontested and objective facts which indicate that these charges were brought in an attempt to establish leverage for divorce-related issues, Mr. Chard was denied the opportunity to have an independent physical and psychological evaluation of his daughter.

This denial infringed upon his basic constitutional rights.

I. The Ruling of the Colorado Supreme Court Denied Due Process to Richard Chard.

At the time Richard Chard requested a physical and a mental evaluation of his daughter in June, 1987, there was no rule set forth by the Colorado Supreme Court. The trial court took evidence from the defendant and then, on an *ad hoc* basis, denied the request.

In April, 1991, the Colorado Supreme Court reviewed this case upon appeal by the state. After review of briefs of cases from around the country, and hearing arguments, the Colorado Supreme Court established the Colorado Rule for a case where child sexual abuse is charged.

The new Colorado Rule requires that the trial court undertake a balancing test, and weigh the potential harm to the complaining party against the likelihood of the examination producing material evidence. This new Rule had not been established at the time of Richard Chard's hearing.

The trial court did not set out the standard or rule it was applying, but simply denied Mr. Chard's request.[2]

Due Process, under the United States Constitution, requires advance notice and a meaningful opportunity to be heard to an individual whose basic rights may be affected. With reference to the words of the due process clause, this Court has stated,

> "...there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

In the case of Richard Chard, where the Colorado Supreme Court has now established the Rule

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[2] In point of fact, if the trial court had applied the Colorado Rule, as established in the *Chard* case, Mr. Chard would have been entitled to the requested evaluations. Dr. Young and Ms. Long (witnesses for the prosecution) both indicated that further examination would cause little, if any, trauma to Risa. The only evidence taken at the hearing indicated both the benefit to the defense and the lack of harm or trauma to the child.

that his proof must meet, in order for him to obtain a mental or physical examination of his daughter, he must be allowed to present his case. Instead, the Colorado Court has denied his due process right to a meaningful evidentiary hearing or to have the trial court consider portions of the record which may not have been included in the appeal, by upholding the original trial court ruling.

In the case of *Armstrong v. Manzo*, 380 U.S. 545 (1965), this Court considered the validity of an adoption decree where the divorced father was not given timely notice of the proceedings. In Armstrong, the Court found that the lack of timely notice placed a real — not theoretical — burden upon the divorced father. The Court further determined that "...these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution." *Id.* at 551.

Likewise, Richard Chard was not given timely notice of the burden on him in order for him to obtain the evaluations he requested. If the Colorado Court is going to establish a Rule to guide the trial court, as it has clearly done in this case, then to afford the

Petitioner his due process, the case must be remanded to the trial court for application of the new Rule.[3]

The Colorado Supreme Court's failure to remand this case to the trial court for further proceedings denied Richard Chard due process. Mr. Chard has never been afforded a reasonable and timely opportunity to present his case for further evaluation to the trial court in accord with the Rule established in his own case. He has the constitutional right to that opportunity.

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[3] In previous decisions, the Colorado Supreme Court has recognized that it connot appropriately usurp the function of the trial court with respect to making *de novo* factual findings. While the Colorado court may not have discussed this issue in terms of the federal constitutional right to due process, it has properly recognized the limit of its own authority.

It is not the function of the Colorado Supreme Court to search the record and supply findings. *Bond vs. District Court*, 682 P. 2d 33, 40 (Colo. 1984); *Cacic vs. Cacic*, 432 P. 2d, 768, 769 (Colo. 1967). Further, the Supreme Court may not usurp the trial court's prerogative to make findings and draw conclusions. *Risbry vs. Swan*, 239 P. 2d 600, 607 (Colo. 1951).

II. Richard Chard was denied his basic constitutional rights, by the ruling of the Colorado court with respect to an independent physical examination and an independent mental examination.

A. Richard Chard was denied his constitutional rights under the Fifth, Sixth and Fourteenth Amendments, when his request for an independent physical examination of his daughter was denied.

Although the Sixth Amendment is most frequently associated with the right of the accused to counsel, *Betts v. Brady*, 316 U.S. 455 (1942), there are additional rights established therein. The accused is entitled "... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him..." Constitution of the United States, Amendment VI.

A defendant's right to an opportunity for effective cross-examination has been recognized by this Court. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

When the Routt County District Attorney's Office received the information from California residents and decided to file a criminal complaint against Richard Chard, Mr. Chard was entitled to know

the true nature and cause of the accusations against him. Where the issue was alleged child abuse and was based in part upon a cursory physical examination, Mr. Chard's request for an independent physical evaluation should have been granted in order to protect and preserve his basic Sixth Amendment rights.

The independent physical examination requested in this case had the potential for (a) determining the nature and extent of any physical harm evidenced by the child, (b) determining whether there had been any sexual activity within the previous eight months, and (c) evaluating the accuracy and validity of the brief physical examination which had been done of the child in February, 1987.

Since Mr. Chard had no contact with his daughter after early September, 1986, a physical examination which revealed some evidence of sexual activity in the preceding eight months would have implicated someone other than Mr. Chard. The basic rights of someone charged with a crime, to know the nature and basis of the charges, was breached by the court's failure to allow an independent physical examination in this case. The Colorado Court of

Appeals agreed with this position, in its Opinion issued on August 31, 1989 (87CA1965).

The discussion to this point is focused upon the basic rights of someone charged with a crime. However, in this case, the underlying motivation was civil in nature and related to custody and child support issues between Mr. Chard and his ex-wife.

The uncontroverted facts in this case establish that Richard Chard and his ex-wife had continuing disputes over child custody and support payments until the time of the trial in this matter. In fact, it was only after the ex-wife had complained of not receiving support payments and had consulted her divorce attorney that the information which served as the basis for this prosecution was provided to the district attorney's office.

Risa visited her father during the summer of 1986. She returned to the home of her mother (Richard Chard's ex-wife) and stepfather in California in September. In spite of the ex-wife's graphic description at the criminal trial of Richard Chard, describing Risa's condition upon her return to California, the ex-wife did not seek either medical or psychological assistance for

Risa for nearly six months.

The ex-wife's description of the trauma to the daughter was cast in the time frame, shortly after the daughter returned from visiting Richard Chard in Colorado. The ex-wife described the daughter's vaginal area as, "bloody", "gapingly open", "real bright red." And the facts, under the ex-wife's own testimony, were that the ex-wife waited nearly six full months before seeking medical review or assistance for the daughter.

The testimony of the ex-wife relating to her personal examination after the daughter returned from visiting Richard Chard is the only link between the daughter's visit to her father in Colorado, and the examination by Dr. Young in California. There is no other testimony which relates to Risa's mental or physical condition during the period between September 1, 1986 and February, 1987.

Subsequent to that period, there was testimony related to the battle over custody of the daughter and to payments by Richard Chard. There was a brief (5-10 minute) vaginal examination performed by Dr. Young, counselling performed by Suzanne Long, a child abuse

report prepared, and testimony prepared against the Respondent, Richard Chard. Long, a child advocate, Young, Risa and the ex-wife prepared their report and testimony in California and submitted their statements in support of an action against Richard Chard. The complaint was filed approximately eight months after he had last seen his daughter.

The Supreme Court of Kentucky has recognized that a defendant in a child abuse proceeding has a basic due process right to an independent examination and opinion. *Turner v. Commonwealth*, 767 S.W. 2d 557 (KY 1989), cert denied 110 S.Ct 2760 (1989).

B. Richard Chard was denied his constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments, when his request for an independent mental or psychological examination of his daughter was denied.

The arguments under this section are analogous to those presented above with respect to the physical examination. Under the facts here, Richard Chard's daughter had been with the ex-wife and the stepfather for approximately six months before any physical examination was done and before any counselling was

commenced. Under these circumstances, with a substantial period of time between the alleged conduct and the period that counselling started, the state of the daughter's mental condition was of utmost significance to her father's defense.

Recent articles, studies and reports have indicated the unreliability of childrens' testimony on certain sensitive issues such as those involved in this case. From the basic standpoint of an individual defendant charged with a crime, the constitutional provisions cited and discussed *supra* dictate an independent mental examination. From the standpoint of the facts in this case, relating the entire dispute to child custody and support payment disputes, the rights are even more clear.

As described in a recent article in *Time* magazine,

> "Child-custody disputes are often the trigger for youngsters' unwitting lies. Suspicions can cause parents to launch what legal scholar Douglas Besharov of Washington's American Enterprise Institute calls 'the atomic bomb of child-custody fights, the charge of sex abuse.' In these stressful situation, children quickly discovery what adults want to hear and can

offer lies or distortions in order to please an anxious parent or social worker." J. Cramer, "Why Children Lie in Court" (March 4, 1991, p. 76).

This same article refers to a study of sex abuse allegations by the American Academy of Child Psychiatry, which indicates that as many as 36% of the allegations were found later to be untrue. Other estimates are substantially higher, indicating that as many as 70% may be unfounded.[4]

The Eberles, investigative reporters, conclude at the end of their book, after investigation and discussion of a number of case histories of alleged child abuse,

> "We believe that every molestation case in which there has been a conviction should be reopened and reviewed. There is convincing evidence that innocent people have been imprisoned, that naive juries and judges were unable to believe that defendants would be charged and brought to trial if no crime had occurred. And defense attorneys have not been allowed to bring all of the pertinent facts before juries." *Id.* at p. 284

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[4]Paul and Shirley Eberle, The Politics of Child Abuse (Lyle Stewart, Inc.: NJ 1986; p. 143).

In another book, prepared by mental health professionals and attorneys, Accusations of Child Sexual Abuse[5] the authors note what has become more obvious and clear since the book was written, "Custody disputes between estranged — and hostile — spouses (or ex-spouses) are an especially fertile ground for such cases."

When undertaking a Fourth Amendment evaluation or balancing test, it is essential that the court consider the stigma on the parents, where a parent is the one being charged with child abuse.

> "In the words of Supreme Court Justice Hugo Black, the parent 'is charged with conduct — failure to care property for her children — which may be viewed as reprehensible and morally wrong by a majority of society.' Researchers have documented the effect of such labelling on the parents...
> Besides the stigma involved, an adjudication of abuse or neglect may result in the parents being placed under long term court supervision and being forced to submit to court or agency treatment programs, may result in the removal

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[5]H. Wakefield and R. Underwager (Charles Thomas Publ. : Illinois, 1988, p. 10).

> of the child from the home for months and perhaps years, may lead to the permanent termination of parental rights, and, ultimately, may mean the parent's incarceration." *Id.* at p. 6.

Richard Chard was confronted by a well-orchestrated case, the linchpin of which was his ex-wife's testimony concerning her examination of their daughter shortly after her visit to Colorado. The ex-wife obviously had both a financial interest (child support) and an emotional interest (custody) in the criminal proceeding. The facts that the ex-wife (1) did not take the daughter for medical attention at the time of her alleged observation of the physical trauma, and (2) did take the daughter to a doctor immediately prior to reinstituting a custody battle over the child, are inherently suspect, and strongly suggest that the criminal complaint was brought to gain full custody of the child.

When confronted with prepared testimony and reports which resulted in criminal charges being filed, Richard Chard requested that there be a second, independent examination of his daughter in order to objectively examine the information that had been

packaged from California. As a defendant to serious criminal charges, Richard Chard had a clear constitutional right to due process, confrontation of the witnesses and the basis of the charges against him and to a fair opportunity to present his defense. This was denied to him in this case.

The Colorado Supreme Court ignored the basic constitutional right of Richard Chard to fundamental fairness, in leaping to address issues of "victims' rights." Under the circumstances here of an ex-wife seeking custody of the daughter, it was not fair for Richard Chard to be confronted and tried with the ex-wife's California reports, without having the opportunity for an independent evaluation of the evidence upon which the ex-wife's reports were based.

If the information sought were merely "physical evidence," there would be no question of the defendant's right to testing and examination of the evidence in his own defense. *Brady v. Maryland*, 373 U.S. 83 (1963). However, here the underlying evidence was the physical and mental condition of his daughter. The physical and mental condition was the basis upon which the accusatory California reports and testimony

were developed. For Richard Chard to have an adequate and fair opportunity to challenge and rebut the orchestrated California testimony, he needed the physical and psychological examinations that were requested by his counsel.

In the alternative, if the Court views the accuser here as Richard Chard's daughter (as opposed to the California doctor and counsellor), then he has a right to confront the witness against him. *Bruton v. United States*, 391 U.S. 123 (1968). The witness here was not only his seven-year old daughter, but was also the medical and psychological reports that accompanied her testimony. The only way for Richard Chard to be able to confront his accuser in this situation was by having independent evaluation of his daughter's physical and mental conditions.

Richard Chard was denied both fundamental fairness (due process, fourteenth amendment) and his right to confront his accuser (sixth amendment) by the decisions of the Colorado court. This Court must recognize the fundamental rights of the defendant, under the United States Constitution.

VII.
CONCLUSION

The Colorado court denied Richard Chard's basic constitutional rights by its refusal to allow a second physical and mental examination under the facts of this case and the information presented to the court. The defendant in this case does not seek reversal of the trial court on a technicality in order to secure his freedom; he seeks full disclosure and the opportunity for the truth to be presented to the trial court.

When the Colorado Court of Appeals reviewed this matter, it determined that Richard Chard was entitled to this independent review of his daughter's mental and physical condition. This Court, under the basic constitutional principles that afford rights to those accused of a crime, should remand the case to the trial court so that the case can be tried in a fundamentally fair manner. This custody and child support dispute should not result in the incarceration of the father for an extended period of time, where he was denied the

reasonable opportunity to examine the basis of the accusations against him.

Respectfully Submitted this 22nd day of July 1991.

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THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

v.

RICHARD JOHN CHARD, III,

Respondent.

No. 89SC547
Supreme Court of Colorado,

En Banc.

March 11, 1991.

Rehearing Denied April 22, 1991.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., John Daniel Dailey, Deputy Atty. Gen., Denver, for petitioner.

Klauzer & Tremaine, Randall W. Klauzer, Steamboat Springs, McGill Professional [p.352] Law Corp., Ralph A. Cantafio, Steamboat Springs, for respondent.

Justice VOLLACK delivered the Opinion of the Court.

The People appeal the court of appeals reversal of Richard John Chard's (the defendant) conviction on five criminal counts of aggravated incest. The court of appeals held that reversal was warranted because of the trial court's failure to compel the seven-year-old victim to submit to involuntary psychological and physical examinations. We reverse.

I.

From June 20, 1986, until September 1, 1986, defendant's daughter, R.S., visited with her natural father, defendant Chard, in Steamboat Springs, Colorado. R.S. was six years old at this time and lived in California with her mother and her stepfather. Shortly after her return to California, R.S. complained to her mother that her "tutu" hurt. R.S.'s mother examined R.S.'s vaginal area and found it to be "gapingly open." She also noted that the area was "real bright red" or "bloody." R.S.'s mother was concerned about R.S.'s condition, but decided not to take her to a doctor at that time.

In February 1987, after speaking with her attorney, R.S.'s mother took R.S. to a California pediatrician, Dr. Valerie Young. After examining R.S. thoroughly, Dr. Young noted that she had an abnormally deep vaginal area, a large hymenal opening, and increased vascularity and scarring in the vaginal area. In addition, R.S.'s rectum was enlarged and unusually loose. Dr. Young concluded that R.S. had been subjected to penile penetration of the vagina and anus over an extended period of time. Dr. Young referred R.S. to a California therapist, Suzanne Long, for counselling. Long interviewed R.S. twice and subsequently filed a child abuse report.

Thereafter, the defendant was charged with five counts of aggravated incest. On June 8, 1987, the defendant filed a motion to compel R.S. to undergo a second physical and psychological examination. The trial court held a hearing on the motion on July 21, 1987, which consisted of testimony by the defendant and a local physician, Dr. David Wilkinson.

Dr. Wilkinson acknowledged that Dr. Young's examination of R.S. was thorough, but he stated that

there were two possible benefits to be derived from a second physical examination. First, a second examination would reveal if the sexual abuse was continuing. Second, some of the findings and measurements in Dr. Young's report were subjective and might differ in a subsequent examination. Dr. Wilkinson conceded, however, that a physical examination could be traumatic or painful to R.S. and that some of her injuries may have healed since Dr. Young's examination.

No expert testimony was presented regarding the requested psychological examination. The defendant testified that R.S. may have accused him of sexual abuse because she had watched material of a "bizarre and deviate sexual nature" on television. The defendant also stated that R.S. had "mischaracterized" certain things that had happened to her. On cross-examination, the defendant testified that R.S. was as "sharp as a tack" and knew the difference between truth and falsity.

From the evidence presented, the trial court concluded that any benefits that could be obtained from a second physical examination were too

speculative. The court also denied the motion for a psychological examination on the basis that cross-examination of R.S. would establish sufficiently whether she was distorting the facts or whether she had been subjected to undue influence.

At trial, R.S. testified that the defendant had stuck his penis into her "tutu" and "bottom" numerous times while she was visiting him in the summer of 1986. Dr. Young testified that R.S. had been subjected to chronic penetration of the vagina with some object and to recurrent, long-term penile penetration of the rectum. Long testified that during her interviews with R.S., R.S. identified the defendant as the person that had sexually abused her. In [p.353] his defense, the defendant took the stand and denied sexually abusing R.S. He presented expert testimony that marriage dissolutions and custody battles could undermine the reliability of a child's sexual assault claims. He also presented expert testimony critiquing Dr. Young's method of measuring vaginal and rectal openings. On November 19, 1987, the jury found the defendant guilty on all five counts of aggravated incest. He was sentenced to 14 years imprisonment.

The court of appeals reversed the defendant's conviction, finding that the defendant had demonstrated a compelling reason for ordering a second physical and psychological examination and that the trial court had abused its discretion by denying these examinations.

II.

We first address the defendant's contention that the trial court abused its discretion by failing to order R.S. to undergo a psychological examination. The defendant claims that a second examination would have little or no traumatic effect on R.S. and that it would determine whether R.S. was competent to testify.

A.

[1] A criminal defendant has a constitutional right to present evidence on his behalf, *People v. Pronovost*, 773 P.2d 555, 558 (Colo.1989), as well as a constitutional right to confront adverse witnesses, *Kogan v. People*, 756 P.2d 945, 959 (Colo.1988). These rights have been construed as granting the defendant the right to obtain material evidence, subject to certain limitations. See *Brady v. Maryland*, 373 U.S.

83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963).

[2,3] In deciding whether to grant a defendant's motion for the involuntary psychological examination of a child sexual-abuse victim, the court must weigh the defendant's right to a fair trail against the invasion of the victim's privacy interests. *Moor v. State*, 709 P.2d 498, 508 (Alaska App.1985). Children are entitled to the same constitutional guarantees as adults, including protection from unreasonable searches and seizures under the fourth amendment. *People v. Nokes*, 183 Cal.App.3d 468,476-81, 228 Cal.Rptr. 119, 123-27 (1986).

Many jurisdictions have sought to balance a defendant's interest in a fair trial against the victim's privacy interests by requiring the defendant to show a "compelling reason or need" before granting a motion for an involuntary psychological examination. *See*, e.g., *Moor v. State*, 709 P.2d at 508; *State v. LeBlanc*, 558 So.2d 507, 509 (Fla.App.1990); *State v. Filson*, 101 Idaho 381, 385, 613 P.2d 938, 942 (1982); *State v. Glover*, 49 Ill.2d 78, 81-83, 273 N.E.2d 367, 370 (1971); *State v. Gregg*, 226 Kan. 481, 488-89, 602 P.2d 85, 91 (1979); *State v. Nelson*, 235 Neb. 15, 20-22, 453

N.W.2d 454, 458 (1990).

Colorado has also adopted the "compelling reason or need" test with regard to involuntary psychological examinations. In *People v. Estorga*, 200 Colo. 78, 82, 612 P.2d 520, 523-24 (1980), this court approved the test set forth in *People v. King*, 41 Colo.App. 177, 179, 581 P.2d 739, 741 (1978), to determine the circumstances under which a trial court should grant a defendant's motion for a compulsory psychological examination of a child sexual-abuse victim. The court in *Estorga* held that a psychological examination "should be ordered only when there is a compelling reason for it." *Estorga*, 200 Colo. at 82, 612 P.2d at 523. The court further held that "the ordering of such an examination is within the discretion of the trial court," *id.*, and that the trial court must " 'balance the possible emotional trauma, embarrassment or intimidation to the complainant against the likelihood of the examination producing material, as distinguished from speculative, evidence.'" *Id.* (quoting *King*, 41 Colo.App. at 179, 581 P.2d at 741). Cases following *Estorga* and *King*

have upheld the trial court's discretion to order a psychological examination only upon the defendant's showing of a "compelling need or reason." *See People v. Woertman*, 786 P.2d 443, 449 (Colo.App.1989), *rev'd on other grounds, Woertman v. People*, 804 P.2d 188 (Colo.1991) (court properly denied motion where the emotional trauma of a second examina- [p.354] tion outweighed the material evidence it would have produced); *People v. Lucero*, 724 P.2d 1374, 1376, (Colo.App.1986) (no abuse of discretion where court balanced valid conflicting interests to deny motion for compulsory psychological examination); *People v. Piro*, 671 P.2d 1341, 1343, (Colo.App.1983) (trial court did not abuse its discretion by denying the defendant's motion to compel a psychiatric examination).

B.

[4] The defendant argues that he demonstrated a "compelling reason" for ordering a second psychological examination of R.S. The defendant's attempt to provide a "compelling reason" in this case consisted of an affidavit and testimony that R.S. had mischaracterized occurrences in her past; that she

had been exposed to bizarre, deviant behavior on television which could have caused her to fabricate some or all of the accusations; and that she had been unduly influenced by her mother and other adults. The *King* court rejected these types of statements as being "conclusory in nature" and "devoid of specific factual recitation." *King*, 41 Colo.App. at 179, 581 P.2d at 741. The defendant's allegations concerning R.S. were also undermined by his testimony on cross-examination when he stated that R.S. was as "sharp as a tack"; that R.S.'s mischaracterizations were nothing of major consequence; that her exposure to bizarre sexual behavior on television consisted of school programs discussing sexual abuse and general access to television; and that R.S. knew the difference between a truth and a lie. The trial court concluded that the defendant had not demonstrated a compelling reason for ordering a second psychological examination and that any "benefits to be obtained from a further examination were too speculative in nature." On this basis, the trial court exercised its discretion and denied the defendant's motion for a second examination of R.S. The record

clearly indicates that the defendant's attempt to demonstrate a compelling reason was inadequate to show that the likelihood of producing material evidence, as opposed to speculative evidence, outweighed the possible trauma, embarrassment, or intimidation that R.S. might feel. *Lucero*, 724 P.2d at 137. The defendant has failed to show that the trial court's decision was manifestly arbitrary, unreasonable, or unfair. *People v. Milton*, 732 P.2d 1199, 1207 (Colo.1987). Therefore, we hold that the trial court did not abuse its discretion in denying the defendant's motion for an involuntary psychological examination of R.S.

III.

We next address the defendant's argument that he demonstrated a compelling reason to order a second physical examination of R.S. and that the trial court abused its discretion in denying this request. The defendant claims that another physical examination would produce evidence useful to his defense.

A.

We first consider what the appropriate

standard is for ordering an involuntary physical examination.

Although many of the policy considerations applicable to a psychological examination also apply to a physical examination, the purpose of each is not necessarily the same. Involuntary psychological examinations are usually ordered to determine the competency of the child victim to testify. *See Lucero*, 724 P.2d at 1375; *Piro*, 671 P.2d at 1342-43. Involuntary physical examinations are usually requested to establish a substantive defense to the sexual-abuse charge. *See Turner v. Commonwealth*, 767 S.W.2d 557, 559 (Ky.1988).

Under the common law, a trial court could not order an involuntary physical examination of a child victim because "discovery in criminal cases was unknown to the common law." *See Sergent v. People*, 177 Colo. 354, 365-66, 497 P.2d 983, 989 (1972); *People ex rel. Shinn v. District Court*, 172 Colo. 23, 26-27, 469 P.2d 732, 733 (1970). The adoption of the Colorado Rules of Criminal Procedure provided defendants with an expanded right to discovery in criminal cases. *Sergent*, 177 Colo. at 366, 497 P.2d at 989. This

right to [p.355] discovery is expressly limited to the categories set forth in Rule 16. *Richardson v. District Court*, 632 P.2d 595, 598-99 (Colo.1981). These categories do not include compelled physical examinations of child victims. *See* Crim.P. 16.

There is a split of authority with regard to a trial court's power to order an involuntary physical examination of a child victim in the absence of statutory authority. Some jurisdictions, most notably North Carolina and Texas, have held that in the absence of specific statutory authority, a trial court may not order an unwilling witness to submit to a physical examination. *See State v. Joyce*, 97 N.C.App. 464, 466-469, 389 S.E.2d 136, 138-39 (1990); *State v. Hewett*, 93 N.C.App. 1, 8-10, 376 S.E.2d 467, 472 (1989); *State ex rel. Wade v. Stephens*, 724 S.W.2d 141, 143-44 (Tex.App.1987). This view has not found widespread acceptance outside of these jurisdictions. The majority of courts considering the issue of whether a trial court has the power to order a compelled physical examination of a child victim in the absence of statutory authority have sought to balance a defendant's right to discover possible

exculpatory evidence against the victim's privacy interests. *See, e.g., People v. Nokes*, 183 Cal.App.3d 468, 476-81, 228 Cal.Rptr. 119, 123-27 (1986). These courts have attempted to strike the proper balance by holding that it is within a trial court's discretion to order an involuntary physical examination, but only on a showing by a defendant of a "compelling need or reason" for the examination. In adopting the "compelling need or reason" test in *State v. Ramos*, 553 A.2d 1059 (R.I.1989), the Rhode Island Supreme Court stated:

> We hold that a trial justice has discretionary power to require a witness in a criminal trial to submit to an independent physical examination only under the most compelling of circumstances. In situations in which the defendant has shown substantial need and justification and no violation of substantial rights will result, the trial justice has discretionary power to order the complainant to undergo a physical examination. The practice of granting physical examinations of criminal witnesses must be approached with utmost judicial restraint and respect for an individual's dignity. In determining whether to order an independent

> medical examination, the trial justice should consider (1) the complainant's age, (2) the remoteness in time of the alleged criminal incident to the proposed examination, (3) the degree of intrusiveness and humiliation associated with the procedure, (4) the potentially debilitating physical effects of such an examination, and (5) any other relevant considerations.

Id. at 1062. In a similar case, the Alabama Court of Criminal Appeals held that a defendant must show an "extreme need" before the trial court will order an involuntary physical examination of a child victim. *Lanton v. State*, 456 So.2d 873 (Ala.Crim.App.1984). The court in *Lanton* stated:

> It may well be doubted, in cases of rape and cognate offenses, whether the court has the power to make an order compelling the inspection of the private person of a prosecutrix in the event of her refusal to submit to such examination. If such right exists at all, we should hold it to be a matter of judicial discretion with the trial court, to be exercised only in cases of extreme necessity, and not a subject of review on appeal to this court.

Id. at 873-74 (quoting *McGuff v. State*, 88 Ala. 147, 153,

7 So. 35, 38 (1889)). A number of jurisdictions have decided to use the "compelling need or reason" test based on reasoning similar to that presented in *Ramos* and *Lanton*. *See State v. Farr*, 558 So.2d 437, 437 (Fla.Dist.Ct.App.1990); *State v. Drab*, 546 So.2d 54,55 (Fla. Dist.Ct.App.1989); *State v. Glover*, 49 Ill.2d 78, 81-83, 273 N.E.2d 367, 370 (1971); *State v. Garrett*, 384 N.W.2d 617, 619 (Minn.App.1986); *People v. Beauchamp*, 126 Misc.2d 754, 758-60, 483 N.Y.S.2d 946, 948 (N.Y.Sup.Ct.1985).

[5] The highly intrusive nature of a physical examination raises the same concerns about emotional trauma, embarrassment, and intimidation to the child victim that are present with regard to a psychological examination. These concerns must be balanced against a defendant's right to [p.356] discovery. We therefore adopt the majority view and hold that a trial court may exercise its discretion to order an involuntary physical examination when a defendant demonstrates a "compelling need or reason" for the examination. In exercising this discretion, the trial court must " ¸balance the possible emotional trauma, embarrassment or intimidation to

the complainant against the likelihood of the examination producing material, as distinguished from speculative, evidence.'" *Estorga*, 200 Colo. at 82, 612 P.2d at 523 (quoting *King*, 41 Colo.App. at 179, 581 P.2d at 741); *see also People v. Woertman*, 786 P.2d 443, 449 (Colo.App.1989), *rev'd on other grounds, Woertman v. People*, 804 P.2d 188 (Colo.1991).

B.

[6] The defendant contends that a second physical examination is necessary for several reasons. It would show the presence or absence of ongoing sexual contact and whether the contact was self-induced or induced by another; it would allow for additional examination techniques not previously utilized; and it would provide expert opinion as to the accuracy of the results obtained by Dr. Young. The defendant argues that these allegations are sufficient to establish a compelling reason for ordering the physical examination.

The trial court denied the defendant's request for a second physical examination because the "benefits to be obtained from a further examination were too speculative in nature." The defendant's

own expert witness, Dr. Wilkinson, testified that a physical examination is "frightening to children, [because] they perceive it as physically painful, and to some extent it can be." Dr. Wilkinson also testified that "the one potential benefit" to be obtained from a second examination "would be to determine if there were ongoing problems." The trial court weighed the competing interests and concluded that the trauma and embarrassment to R.S. outweighed any benefits the defendant might obtain from the examination.[1]

In *People v. Nokes*, 183 Cal.App. 3d 468, 228 Cal.Rptr.119 (1986), the California Court of Appeal considered an argument similar to the one made by the defendant and stated:

> The exercise of discretion to refuse to compel a child victim to submit to a physical examination when the examination could at best produce results equivocal on a defendant's "innocence" should not be disturbed unless the exercise of discretion has been so arbitrary and capricious that no

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[1]The record indicates that the trial court recognized that the defendant's right to discovery must be weighed against the victim's privacy interest. (cont. next page)

> reasonable court could have made such a finding.

Id., at 481, 228 Cal.Rptr. at 127. The reasoning of the *Nokes* court is applicable to this case. The record indicates that even if evidence of ongoing sexual abuse was found, it would not prove that the defendant did not sexually abuse R.S. previously. Any evidence discovered by a second examination of

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In weighing these competing interests, the court considered Dr. Wilkinson's testimony as to the nature of the examination and the possible benefits to be obtained, concluded that the benefits were "not so pressing or persuasive" as to require the court to grant the motion. The court, in its denial of defendant's motion, found:

> [T]he benefits that could possibly be derived from another physical examination are one, speculative, and two, simply this Court does not believe that they would in fact show anything beneficial [to Chard] that could conceivably be presented at the time of the trial in this case. Further, the Court is satisfied that upon cross-examination, properly conducted appropriate inquiry into this area could be made. And if, indeed, some third party has been perpetrating assaults on this child, this child presumably is

R.S. would be speculative and "could at best produce results equivocal on the defendant's 'innocence.'" *Id.* Accordingly, we hold that the trial court applied the proper balancing test and did not abuse its discretion in denying the defendant's motion for a second physical examination.

The judgment of the court of appeals is reversed. [p.357]

ERICKSON, J., concurs in part and dissents in part.

ROVIRA, C. J., and LOHR, J., do not participate.

Justice ERICKSON concurring in part and dissenting in part.

Richard Chard was found guilty by a jury of five counts of aggravated incest. The trial court sentenced Chard to fourteen years imprisonment. I agree with the standard created by the majority to determine whether a minor victim of a sexual assault can be required to submit to a physical examination and therefore concur in part. However, I dissent in part because the trial court did not apply the standard which this court has now created. I would

remand for a new hearing to determine whether the denial of the defendant's motion for a medical examination under the new standard should have been granted. If the motion is granted, a new trial is required.

R.S., the defendant's daughter, lived with her mother and stepfather in California. The defendant father lived in Steamboat Springs, and had summer visitation privileges with R.S. in 1986. Not long after R.S. return to California, she complained of pain in her "tutu" (vagina). Her mother found evidence of sexual abuse but did not take R.S. to a doctor for more than six months. When a medical examination was made, it was discovered that both the vagina and anal orifices were enlarged. This medical examination and a subsequent psychological examination resulted in the filing of charges against the defendant.

Prior to trial, the defendant filed a motion to require R.S. to undergo a second physical examination. The defendant denied that he had assaulted his daughter and contended that such an examination was necessary to prepare his defense

because the only examination of R.S. was conducted a full six months after the incident allegedly occurred. The defendant contended that the sexual assaults were committed by R.S.'s stepfather. A second physical examination may have produced evidence of whether R.S. was the victim of continuing sexual abuse, and would have been relevant to the question of whether the defendant or the stepfather had committed the abuse.

After hearing the testimony of an expert witness, the trial court denied the defendant's motion, concluding that the benefits to be derived from the physical examination of R.S. were too speculative. The court did not, however, as the majority states, weigh the competing interests and conclude that the trauma and embarrassment to R.S. would outweigh any benefits the defendant might obtain from the examination.

The majority sets forth a new standard for determining whether a trial court should order an involuntary physical examination of a minor victim of a sexual assault at the request of the accused. The standard announced by the majority was not applied

by the trial court. The court of appeals concluded that the denial of the defendant's motion for a physical examination required reversal and a new trial. In my view, the new standard requires that we remand this case to the trial court for a new hearing on the defendant's motion to have R.S. submit to a physical examination. We cannot speculate on how the trial court would have ruled if it had applied the newly created standard or test. *Bond v. District Court*, 682 P.2d 33, 40 (1984); see also *Cacic v. Cacic*, 164 Colo. 103, 106, 432 P.2d 768, 769 (1967) (not the function of the supreme court to search the record and supply findings); *Carpenter v. Donohoe*, 154 Colo. 78, 80-81, 388 P.2d 399, 401 (1964) (same); *Risbry v. Swan*, 124 Colo. 567, 580, 239 P.2d 600, 607 (1951) (supreme court may not usurp trial court's prerogative to make findings and draw conclusions).

I would therefore direct the court of appeals to remand the case to the trial court with directions to allow the defendant to present evidence demonstrating the compelling need for a physical examination of R.S. If the trial court concludes, applying the new standard, that the defendant is not

entitled to have R.S. submit to a physical examination, the judgment and sentence should be affirmed. However, if the trial [p. 358] court determines that the defendant's motion should have been granted, a new trial should be granted.

Accordingly, I concur in part and dissent in part.

COLORADO COURT OF APPEALS

No. 87CA1965

THE PEOPLE OF THE STATE OF COLORADO,	)	
Plaintiff-Appellee,	)	NOT SELECTED FOR PUBLICATION
v.	)	
RICHARD JOHN CHARD, III, Defendant-Appellant.	)	

Appeal from the District Court of Routt County
No. 87CA23

Honorable Scotty P. Krob, Judge
Honorable Richard P. Doucette, Judge

DIVISION I
Opinion by JUDGE VAN CISE*
Pierce and Jones, JJ., concur

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

*Sitting by assignment of the Chief Justice under provisions of the Colo. Const., art. VI, Sec. 5(3), and 24-51-1105, C.R.S. (1988 Repl. Vol. 10B).

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[Slip Op., p.1] Defendant, Richard John Chard, III, appeals the judgment of conviction entered on a jury verdict finding him guilty of five counts of aggravated incest with his six-year old daughter. We reverse.

Defendant lived in Colorado and his ex-wife lived in California. They had joint custody of their daughter. She lived with her father in the summer and her mother the rest of the year.

In April, 1987, defendant was arrested and

charged with acts of incest alleged to have occurred during the child's visitation with him in the summer of 1986. The charges were based on information received from a California police officer who had interviewed the child and the child's mother in March, 1987, from the written report of a physical examination of the child by a California physician on February 28, 1987, and from the report of interviews by a California social worker/psychotherapist in March 1987 in which the child related details of her alleged sexual relations with her father.

After preliminary hearing but before arraignment, defendant filed a motion for an order permitting him to have the child examined by qualified medical and mental health professionals of his selection. An evidentiary hearing was conducted at which a local physician testified as to the possible value of second examinations and defendant related how bright [Slip Op., p. 2] and articulate the child was. The motion was denied on the grounds that nothing beneficial could be expected to result from such examinations and that cross-examination of the child and of the prosecution's experts who had

already examined the child would suffice.

At trial, the testimony of the mother, the child, the physician, and the social worker supported the charges. Defendant testified and denied the charges. His conviction followed.

Defendant's main contention on appeal is that the denial of his motion for physical and mental examinations constituted reversible error. We agree.

Our supreme court in *People v. Estorga*, 200 Colo. 78, 612 P.2d 520 (1980), and this court in *People v. Woertman*, ___ P.2d ___ (Colo. App No. 86CA1069, July 6, 1989), and in a line of cases dating back to 1978, has held that a court should order a psychological examination of an alleged child molestation victim only if there is a compelling reason for it, and, in assessing whether such an examination is needed, a court should balance the possible emotional trauma, embarrassment, or intimidation to the child against the likelihood of the examination producing material, as distinguished from speculative, evidence. The same test is applicable to requests for physical examinations. *Woertman, supra.*

[Slip op. p. 3] The circumstances in this case met the prescribed test. The compelling reason for ordering an additional examination is to enable defendant, as a matter of fundamental fairness, to corroborate or contradict the previous examinations performed without being limited to the expert witnesses selected by the mother and the prosecution. There was no indication that second examinations would traumatize the child; instead, at the hearing on the motion, the trial court found that she was "a bright, articulate child." It further held that: "This court cannot believe that that child could be so petrified as to be unable to report ongoing assaults at this point in her life." The trial court abused its discretion in denying the motion.

In view of our disposition of this case, we do not address defendant's contention regarding the ruling on the violation of the witness sequestration order.

The judgment is reversed, and the cause is remanded for a new trial.

JUDGE PIERCE and JUDGE JONES concur.